Supreme Court, U.S.
FILED
NOV 24 1998
CLERK

No. 98-679

In The

Supreme Court of the United States

October Term, 1998

METRO FORD TRUCK SALES, INC.,

Petitioner,

v.

FORD MOTOR COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether § 1 of the Sherman Act proscribes purely unilateral conduct.

2. Whether there is any evidence to support Petitioner's new argument in this Court that there was an "implied" agreement to fix prices in violation of § 1 of the Sherman Act.

3. Whether summary judgment was properly granted on Petitioner's Robinson-Patman price-discrimination claim because Petitioner presented no evidence to support that claim.

RULE 29.6 STATEMENT

Ford Motor Company has no parent corporation and no other corporation has a financial interest in this matter. However, the following is a list of domestic and foreign companies in which Ford Motor Company owns an equity interest of at least 10% but less than 100%.

The Hertz Corporation

FRN of San Diego, LLC

FRN of Tulsa, LLC

Argentina

Invercred Compania Financiera S.A.

Australia

Ford Motor Company of Australia Limited

Belgium

Ford Motor Company (Belgium) N.V.

Brazil

Autolatina Comercio e Participacoes Financerias Ltd.

Denmark

Ford Motor Company A/S

Finland
Oy Ford Ab

Germany
Ford Werke-Aktiengesellschaft

Holland
Ford Nederland B.V.

Japan
- Mazda Motors Corporation

Korea
Ford Motor Company of Korea

Norway
Ford Motor Norge A.S.

New Zealand
Ford Motor Company of New Zealand Limited

Singapore
Ford Motor Company Private Limited

Switzerland
Ford Motor Company (Switzerland) S.A.

Vietnam
Ford Vietnam Limited

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STATEMENT OF THE CASE

A. Underlying Facts.

This is an antitrust action brought by Metro Ford Truck Sales, Inc. ("Metro") against Ford Motor Company ("Ford").

Ford sells its medium and heavy trucks almost exclusively to authorized Ford dealerships throughout the United States.[1] To meet the competition of other manufacturers, Ford offers its dealerships what is known as Competitive Price Assistance, or CPA. CPA is an allowance given by Ford to the dealership to reduce the wholesale price of the truck to enable the dealer to meet competition from other sellers. (SUF ¶¶ 24-25)[2]

During the 1990-94 period at issue here, all Ford medium and heavy truck dealerships were eligible to receive a standardized base level of

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[1] Metro inexplicably asserts that Ford's sale of heavy trucks is "[u]nlike all other products" because "Ford does not sell heavy trucks at retail." (Pet. at 3) Of course, this Court may take judicial notice that Ford typically does not sell *any* products at retail.

[2] "SUF" refers to Ford's Statement of Undisputed Facts in Support of Ford Motor Company's Motions for Summary Judgment, filed in the trial court. The evidence supporting each numbered paragraph of this statement was attached to the statement.

CPA, called "Sales Advantage," on every truck they purchased. (SUF ¶ ¶¶ 8, 27, 118) If dealerships could demonstrate that higher concessions were necessary for them to meet competition, they could request additional price reductions, called "Appeal Level CPA," by filing an appeal form with Ford's "CPA Central." (SUF ¶¶ 8, 31-33) Dealerships were required to substantiate competitive need with information such as a copy of a competitive quote obtained from the customer, a statement by the dealership that they had been shown a competitive quotation by the customer, or a brief history of recent bids to the account, or similar accounts, which indicate the amount of pricing assistance currently offered by the competition. (SUF ¶36)

Ford's CPA pricing managers reviewed the appeal form against previous bid histories involving the same customer, and against successful and unsuccessful bids of similar vehicles in the same region and around the country, to determine the amount of additional CPA that Ford would grant based on Ford's evaluation of competitive need. (SUF ¶ 41) Where Ford was aware that more than one Ford dealership was bidding to the same customer, Ford's policy was to equalize the Appeal Level CPA granted to each dealership. (SUF ¶ 26) As a result, Ford dealerships that were in direct competition for the same retail customers received

the same Appeal Level CPA. (SUF ¶¶ 8, 10-12, 26, 46, 118-120)[3]

Metro has *admitted* that Metro, for the purpose of securing more CPA than Ford would otherwise have allowed, *systematically* represented that trucks were being sold to certain customers when in fact the trucks were being sold to other, unrelated customers. (SUF ¶¶ 48-50, 52, 53, 64-66, 69) Metro has *admitted* to making these fraudulent representations in connection with the sale of 317 trucks in two years alone. (SUF ¶ 53) Further, Metro has *admitted* that it created an entire set of dummy files—one containing the names of the real customers and the other the names of the fictitious customers—to conceal the true information from Ford's auditors. (SUF ¶¶ 53, 61-63)

Ford discovered Metro's fraudulent scheme and conducted an audit in 1994. (SUF ¶ 123) Although Ford was the victim of Metro's admitted

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[3] For sales to certain customers whose purchases commonly attracted intense competition, including heavy truck leasing companies, Ford streamlined the appeal process by providing standardized schedules of higher allowances. To obtain standardized allowances for sales to these customers, a dealership was not required to demonstrate individualized competitive need. All that was necessary was a telephone call to Ford's CPA Hotline in Kentucky, identifying the eligible customer and the vehicles and options needed. (SUF ¶¶ 10-12, 46-47)

fraud, it was *Metro* that commenced the present action against *Ford*.

B. Proceedings in the District Court

In the district court, Metro claimed that Ford's CPA program constituted vertical price fixing that is illegal *per se* under § 1 of the Sherman Act, 15 U.S.C. § 1. The district court granted summary judgment for Ford on this claim. The district court held that there was no evidence of an agreement to fix prices, that Metro had offered no proof that Ford announced or enforced retail prices, that the evidence showed that Metro was free to decide its own prices, and that Ford "set only wholesale prices, which it is legally entitled to do." (App. 24a-26a)[4]

Metro also claimed that Ford had engaged in price discrimination in violation of § 2(a) of the Robinson-Patman Act. The district court granted summary judgment for Ford on this claim as well, holding that "the record reveals that the CPA program was open to all dealers on an equal basis and that Ford equalized the CPA given to every Ford dealer known to be bidding to the same customer." (App. 28a)

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[4] "App" refers to the Appendix to the Petition for Writ of Certiorari.

C. Proceedings in the Court of Appeals

Metro appealed to the United States Court of Appeals for the Fifth Circuit. In its appellate brief, Metro expressly conceded that its price-fixing claim under the Sherman Act was based on Ford's "unilateral" conduct. (Brief of Plaintiff-Appellant at 16, 17, 23) In fact, in its reply brief Metro characterized its case as a "purely-unilateral" price fixing case. (Reply Brief of Plaintiff-Appellant at 3) The Fifth Circuit observed that "the distinction between independent action and joint action is fundamental in antitrust jurisprudence, and a claim will not exist in the absence of the latter." (App. 8a) Accordingly, it affirmed the district court's conclusion that the lack of a "contract, combination ... or conspiracy" precluded Metro's Sherman Act claim. (App. 8a-9a)

The Fifth Circuit also affirmed the dismissal of Metro's Robinson-Patman price discrimination claim:

> As found by the district court, the record reflects that Metro was treated the same as all other Ford dealers with respect to CPA for the same customer, and products of like grade and quality. The record further establishes that the CPA program functioned to ensure that all Ford dealers issuing bids to the same customer received equal CPA, and that all Ford dealers could meet the compe-

> tition from other original equipment manufacturers. Metro concedes that the discounts were available to it on an equal basis with other Ford dealers. We therefore must find that price discrimination did not exist, and that no violation of the Robinson-Patman Act occurred.

(App. 10a-11a)

REASONS FOR DENYING THE WRIT

I. FORD WAS ENTITLED TO SUMMARY JUDGMENT ON METRO'S VERTICAL PRICE FIXING CLAIM

In the Court of Appeals, Metro made no attempt to challenge the district court's conclusion that Metro had produced no evidence of an agreement between Ford and its dealers to fix retail prices. Instead, Metro argued that § 1 of the Sherman Act was broad enough to proscribe conduct by Ford that Metro itself characterized as "purely unilateral." In this Court, Metro appears to repeat its untenable argument that "unilateral" conduct can be *per se* illegal under § 1 of the Sherman Act. Now, however, Metro also argues, belatedly, that the evidence also shows an "implicit 'agreement'" to fix prices. Both arguments are completely without merit. The evidence shows without contradiction that Metro was at all times free to charge whatever retail price it

wished; Ford can be found guilty of fixing prices in this case only if setting wholesale prices constitutes price fixing, an obviously untenable conclusion.

A. The Court of Appeals Properly Rejected Metro's Argument That Section 1 of the Sherman Act Proscribes Unilateral Conduct

Metro's argument that § 1 of the Sherman Act proscribes purely unilateral conduct was properly rejected by the Fifth Circuit. Section 1 of the Sherman Act expressly and unambiguously declares illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade." 15 U.S.C. § 1. Accordingly, there can be no reasonable debate that proof of a violation of this section *always* requires proof of a "contract, combination ... or conspiracy"—i.e., concerted action of some sort—even in a vertical price-fixing case. *See, e.g., Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 735-736 (1988); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763 (1984).

Metro baldly asserts that this Court in *Business Electronics* and *Monsanto* "reiterated" the rule that "unilateral" vertical price restraints are *per se* illegal under Section 1 of the Sherman Act." (Pet. at 9-10) But in *Business Electronics*, this Court expressly held that a "vertical restraint is not

illegal *per se* unless it includes some agreement on price or price levels." 485 U.S. at 735-736. Similarly, in *Monsanto*, this Court expressly reaffirmed that "[o]n a claim of concerted price fixing, the antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was such an agreement." 465 U.S. at 763. In fact, this Court in *Monsanto* emphasized the "basic distinction between concerted and independent action" and once again stated unequivocally that "independent action is *not* proscribed." *Id.* (emphasis added).

Thus, it unquestionably remains the law that § 1 of the Sherman Act "does not reach conduct that is 'wholly unilateral,'" *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984), and the Fifth Circuit properly rejected Metro's completely unsupported argument to the contrary.

B. Metro Has Produced No Evidence From Which A "Contract, Combination ... Or Conspiracy" To Fix Prices May Be Inferred.

Now, in this Court, Metro belatedly argues that the evidence in this case shows that there was an "implicit 'agreement'" to fix prices. (Pet. at 10) Assuming that Metro may properly make this argument in this Court without having made it in the Court of Appeals, it is without merit.

As the district court recognized, liability for vertical price fixing under the Sherman Act does not require evidence of an express agreement to fix prices. Rather, as the district court also recognized, "Metro can indirectly establish the existence of an agreement if it proves that Ford announced a retail price and took some course of action to enforce that price." (App. 25a) *See, e.g., United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960); *J. T. Gibbons, Inc. v. Crawford Fitting Co.*, 704 F.2d 787, 794 (5th Cir. 1983). But the district court granted Ford's motion for summary judgment because Metro produced no evidence that Ford announced a retail price or took any action to enforce that announced price. (App. 25a)

Metro has never challenged the factual basis for the district court's holding, neither in the Fifth Circuit nor in this Court. In fact, the undisputed testimony of Metro's sales staff was that Ford never instructed Metro not to sell above or below a particular price, and that Ford never threatened or took any action against Metro for violating such a hypothetical instruction. (SUF ¶ 121) Further, Metro conceded below that its own sales staff "believ[es] Ford has nothing to do with controlling the retail prices they can charge." (Metro's Response to Ford's Motion for Summary Judgment-Metro's Antitrust Claims at 10). Thus, if Ford did announce a retail price, it was a secret even from those individuals who actually negotiated Metro's retail sales.

Nevertheless, Metro argues that "[d]ealers 'agree' to sell at the retail price Ford fixes *because they have no choice but to do so.*" (Pet. at 10, emphasis in original) Apparently, Metro's claim is that dealers "have no choice" because the wholesale price ultimately set by Ford through CPA allowances "fix[es] the lower limit of the price range (i.e., the price floor) below which a dealer cannot profitably resell a truck." (Pet. at 4-5) Thus, Metro's argument in this Court appears to be simply that Ford and its dealers implicitly "agree" to fix prices because Ford sets a wholesale price and dealers agree to buy at that wholesale price, thereby effectively "fixing" a retail price below which the dealer cannot profitably sell.

Of course, no retailer can profitably sell a product below its wholesale price. Therefore, *every* wholesale price "fixes" a retail price floor below which the retailer cannot profitably sell. Nevertheless, setting a wholesale price is not retail price fixing, because the retailer always remains free to decide for itself the retail price to charge, the profit margin it finds acceptable under the circumstances, and whether legitimate business considerations justify selling at a loss. In this case, for example, Metro at all times remained free to lower its prices to the maximum extent consistent with its own view of an acceptable profit margin, and Ford had no obligation to lower its wholesale prices (and perhaps sell to Metro at a loss) solely

to increase Metro's margin to a level deemed acceptable to Metro.

Under these circumstances, "[t]he decision as to what margin to use and when to change it, and consequently what retail price to charge remains [Metro's], and ...such economic impact as follows from [Ford's] tight control of its own wholesale pricing is not a Sherman Act violation." *Butera v. Sun Oil Co.*, 496 F.2d 434, 438 (1st Cir. 1974). In fact, as the district court observed, at least three courts have upheld Ford's pricing system or systems remarkably similar to Ford's. *AAA Liquors, Inc. v. Joseph E. Seagrams & Sons, Inc.*, 705 F.2d 1203, 1207 (10th Cir. 1982), *cert. denied*, 461 U.S. 919 (1983); *Lewis Service Center, Inc. v. Mack Trucks, Inc.*, 714 F.2d 842 (8th Cir. 1983); *Capital Ford Truck Sales, Inc. v. Ford Motor Co.*, 779 F. Supp. 1345 (N.D. Ga. 1990)(upholding Ford's CPA system against the same Sherman Act challenge made here).

Metro relies heavily on the decision in *Greene v. General Foods Corp.*, 517 F.2d 635 (5th Cir. 1975), *cert. denied*, 424 U.S. 942 (1976), but the facts of that case are so obviously dissimilar to the facts here that it is hardly surprising that neither of the courts below saw any need to even cite that decision. In *Greene*, the manufacturer of coffee, General Foods, entered into an express contract with its retailer which apparently obligated the retailer to sell coffee to certain institutional accounts (known as MFSA accounts) at certain

specified prices "in accordance with General Foods' national MFSA price list." 517 F.2d at 641. When the retailer "attempted to sell to MFSA's at a higher price, he was directed to adhere to the MFSA formula." 517 F.2d at 643. When the retailer failed to adhere to the pricing system, his distributorship agreement was terminated. 517 F.2d at 658. Thus, *Greene,* unlike this case, involved an express agreement between the manufacturer and the retailer to fix the MFSA prices, an agreement that the manufacturer enforced through terminating the retailer's dealership agreement. There is no comparable evidence in this case.

In short, the district court in this case was correct when it held that "Ford set only wholesale prices, which it is legally entitled to do." (App. 25a)[5]

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[5] Metro also relies on this Court's decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), which it characterized in the Court of Appeals as a "purely-unilateral [resale price maintenance] case." (Reply Brief at 3) But *Dr. Miles* involved express contracts between a manufacturer and its retailers that expressly prohibited the retailers from "sell[ing] or furnish[ing] the [products] to any person, firm or corporation whatsoever, at less than the full retail price as printed on the packages." 220 U.S. at 380. In short, *Dr. Miles* plainly did not involve purely unilateral conduct; on the contrary, like *Greene*, it literally involved an express contract to fix prices.

II. The District Court Properly Dismissed Metro's Robinson-Patman Act Price Discrimination Claim

Metro's price discrimination claim under the Robinson-Patman Act was properly dismissed by the district court, and that ruling was properly affirmed by the Fifth Circuit, because Metro made no attempt to show that CPA was not functionally available to Metro on the same terms that it was made available to all other Ford dealers. But Metro's price discrimination claim also fails for other reasons advanced by Ford in the district court that the district court and the Fifth Circuit had no need to address. Specifically, Metro failed to present any evidence of two or more reasonably contemporaneous sales of goods of "like grade and quality" and further failed to present any evidence of any injury to competition.

A. The District Court Correctly Determined That Metro Failed To Prove Discrimination Because It Failed To Prove That CPA Was Not Functionally Available To All Ford Dealers, Including Metro

Section 2(a) of the Robinson-Patman Act provides as follows:

> It shall be unlawful for any person engaged in commerce ... to discriminate in price between different purchasers of commodi-

> ties of like grade and quality, ... where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

15 U.S.C.A. § 13(a). "In short the Act, as its language indicates, requires equality of treatment among purchasers, but it does not require a seller to adopt a single uniform price under all circumstances." *FLM Collision Parts, Inc., v. Ford Motor Co.,* 543 F.2d 1019, 1026 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977).

"[E]ven when a seller has a dual pricing system, if the lower price is available to all purchasers, not only in theory but in fact, there is no violation of § 2(a)." *Id.* at 1025-1026 (citation omitted). If discounts are "functionally available to the plaintiffs, then as a matter of law either there is no price discrimination or the discrimination is not the proximate cause of the injury." *Comcoa, Inc. v. NEC Telephones, Inc.,* 931 F.2d 655, 664, 665 (10th Cir. 1991)(instruction to this effect was "an accurate statement of the law"); *accord, e.g., Bouldis v. U.S. Suzuki Motor Corp*, 711 F.2d 1319, 1326 (6th Cir. 1983)(price concessions and allowances "will not give rise to a Robinson-Patman violation if the concessions are available

equally and functionally to all customers"); *Shreve Equip., Inc. v. Clay Equip. Corp.*, 650 F.2d 101, 105 (6th Cir.), *cert. denied*, 454 U.S.897 (1981)("Where a purchaser does not take advantage of a lower price or a discount which is functionally available on an equal basis, it has been held that either no price discrimination has occurred, or the discrimination is not the proximate cause of the injury."); *Edward J. Sweeney & Sons, Inc. v. Texaco*, 637 F.2d 105, 120 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981)("a uniform pricing formula applicable to all customers is not a price discrimination under the act"); *Capital Ford Truck Sales, Inc. v. Ford Motor Co.*, 819 F. Supp. 1555, 1568, 1571 (N.D. Ga. 1992)("Plaintiffs must also show that ... the price discrimination involved a discount that was not 'functionally available' to [the dealer] on equal terms"; Ford's motion for summary judgment granted because CPA on CF-8000 trucks was "functionally available to [the dealer]"); *Rod Baxter Imports v. Saab-Scania of America, Inc.*, 489 F. Supp. 245, 248 n. 2 (D. Minn. 1980)("If the bonuses were available to all competitors on the same terms, then the bonuses would not be discriminatory ... .").

Thus, the district court in this case correctly recognized that Metro could not prevail absent "probative evidence that the same level of CPA was not functionally available to all dealers." (App. 28a) Further, it correctly concluded that Metro had failed to submit such evidence. *(Id.)* In

fact, as the district court recognized, the uncontroverted evidence affirmatively established all of the following:

1. Ford's CPA program "was open to all dealers on an equal basis." (App. 28a)
2. "Ford equalized the CPA given to every Ford dealer known to be bidding to the same customer." (App. 28a)[6]
3. Dealers selling identical trucks to different customers could receive various levels of CPA, depending upon whether the sales qualified for Sales Advantage CPA, Appeal Level CPA, or Leasing Schedule CPA, but this "only highlights the fact that the amount of CPA varied with the competitive situation"; "the important fact is that no matter what level of CPA applied, that level was available to all dealers." (App. 28a n.12)

In this Court, Metro mischaracterizes the holdings of the district court and the Fifth Circuit by assuming that they rest exclusively upon the second point, i.e., the fact that two dealers bidding to sell to the same customer will receive the same

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[6] Metro asserts that Ford's "equalization" policy is not a "proven reality" but is based "on Ford's self-serving *representations* that equalization occurs." (Pet. at 18) In fact, however, Ford's policy of equalizing CPA is established by uncontroverted, sworn deposition testimony. (SUF, Ferguson Aff., Exhibit 7 at 410, 413-414).

amount of CPA. Metro ignores altogether the more general point: the amount of CPA granted does vary based upon varying competitive situations, but given the same competitive situations the same level of CPA would be available to all dealers. (SUF ¶¶ 117-120)[7]

B. Metro's Price Discrimination Claim Fails For Other Reasons As Well.

In the district court, Ford advanced other reasons why it was entitled to summary judgment on Metro's price discrimination claim. The district court and the Fifth Circuit did not need to address these other issues, but Ford is entitled to defend the judgment based on any ground supported by the record. *E.g., Bennett v. Spear*, 520 U.S. 154, 181 (1997).

First, to prevail under Robinson-Patman, Metro was obligated under the express terms of

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[7] Metro asserts that Ford "can decide which dealers receive lower prices, which in turn allows Ford to choose the dealers it believes it can later 'control' and favor them with lower prices all around." (Pet. at 17) Metro also suggests that Ford has "favored" and "disfavored" dealers and that Ford grants larger CPA allowances to the former. (*Id.*) Metro cites no evidence to support these claims. In fact, the uncontroverted, sworn deposition testimony establishes that the identity of the dealer is not a consideration in determining the level of CPA to be awarded. (SUF, Ferguson Aff., Exhibit 7 at 389)

the statute to show that two or more sales of items of "like grade and quality" were made at different prices. 15 U.S.C. § 13(a). Thus, a "threshold finding" essential to the applicability of § 2(a) is that the goods allegedly sold at discriminatory prices were of "like grade and quality." *F.T.C. v. Borden Co.*, 383 U.S. 637, 639 (1966). But Metro has made no attempt to identify *any* transactions in which Ford sold two or more trucks of "like grade and quality" at different prices.[8]

Even if Metro had identified two or more sales of comparable trucks, it would have been required to prove that those sales were "reasonably contemporaneous in that they 'must (1) have been entered into within a reasonably short time period and (2) contemplate reasonably simultaneous delivery of the goods involved in the transaction." *Black Gold, Ltd. v. Rockwool Industries, Inc.*, 729 F.2d 676, 683 (10th Cir.), *cert. denied*, 469 U.S. 854 (1984); *accord, e.g., Capital Ford*, 819 F. Supp. at 1572 (contracts entered into at different times "are not the proper subject of a price discrimination claim"). But in its response to Ford's motion for summary judgment, Metro did not even argue that there were any such "reasonably con-

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[8] *A fortiori*, of course, Metro has presented no evidence of any transactions in which Ford sold two or more trucks of "like grade and quality" at different prices under the same competitive circumstances.

temporaneous" sales; thus, Metro effectively conceded the issue. (Metro's Response to Ford's Motion for Summary Judgment-Metro's Antitrust Claims, at 27-28) For this reason as well the district court's judgment must be affirmed.

Finally, "[e]ven if the sales at different prices are contemporaneous [and] involve goods of like grade and quality ... recovery under the Act is precluded absent proof that the price variance detrimentally affected competition." *M.C. Mfg. Co. v. Texas Foundries, Inc.*, 517 F.2d 1059 (5th Cir. 1975), *cert. denied*, 424 U.S. 968 (1976). Thus, Metro was required to prove "that the result of price discrimination 'is likely to be a severe, adverse effect on competition.'" *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575, 580 (5th Cir.), *cert. denied*, 459 U.S. 908 (1982). Nevertheless, Metro's "expert" admitted that he had made no attempt to determine if the alleged price discrimination had any effect on competition. As Metro made no attempt to prove the requisite effect on competition, the district court's judgment must be affirmed for this reason as well.

CONCLUSION

Metro's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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